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The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v. Tadic*

GEOFFREY R. WATSON*

On October 2, 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia¹ held that the Tribunal has jurisdiction to try Dusko Tadic, a Bosnian Serb, for war crimes and crimes against humanity.² The Appeals Chamber ruled that the establishment of the Tribunal was lawful, that the Tribunal's primacy over national courts does not violate international law, and that the Tribunal's jurisdiction extends to crimes committed in internal armed conflict.³ The decision cleared the way for the first international war crimes trial since Nuremberg and Tokyo. The Appeals Chamber was right to uphold the validity of the Tribunal

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1. This is the official abbreviated title for the Tribunal. See U.N. Press Release, No. IT/13, Nov. 30, 1993, and No. IT/30, Feb. 11, 1994. The full title of the Tribunal is The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.

2. *Prosecutor v. Tadic*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72 (Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996) [hereinafter Decision of the Appeals Chamber]. The Decision of the Appeals Chamber is available electronically on the World Wide Web at <http://www.igc.apc.org/tribunal> [hereinafter Tribunal's Web Site].

3. Decision of the Appeals Chamber, *supra* note 2, para. 146 (disposition), paras. 9-48 (opinion on validity of establishment of Tribunal), paras. 49-64 (on primacy of Tribunal), paras. 65-145 (on subject-matter jurisdiction). The decision revised and affirmed an earlier decision of the Trial Chamber of the Tribunal. See *Prosecutor v. Tadic*, Trial Chamber, Decision on the Defence Motion on Jurisdiction, Case No. IT-94-1-T (Aug. 10, 1995) [hereinafter Decision of the Trial Chamber]. The Decision of the Trial Chamber is also available on the Tribunal's Web Site, *supra* note 2.

and its primacy over national courts, but, as this article will argue, the Chamber's sweeping interpretation of the Tribunal's jurisdiction raises some troubling questions.

I. THE INTERNATIONAL CRIMINAL TRIBUNAL

On May 25, 1993, the U.N. Security Council adopted a resolution purporting to "establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991."⁴ Following its well-established practice, the Council asserted that it was acting under Chapter VII of the U.N. Charter without citing any particular provision of Chapter VII. The resolution incorporates without amendment the Secretary-General's proposed Statute for the Tribunal.⁵ In addition, the resolution requires that all states "shall cooperate fully" with the Tribunal.⁶

Eleven judges sit on the Tribunal, which has its seat at the Hague.⁷ The judges are elected by the General Assembly from a list submitted by the Security Council.⁸ No two judges may be

4. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993), reprinted in 32 I.L.M. 1203 (1993). See also S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding that such a tribunal "shall be established," and requesting the Secretary-General to submit proposals for implementation of the decision). Earlier, the Council had called on states and international organizations to submit information on war crimes to the Council, see S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg., U.N. Doc. S/RES/771 (Aug. 13, 1992), reprinted in 31 I.L.M. 1470 (1992) and thereafter asked the Secretary-General to establish a Commission of Experts to examine the information submitted and to conduct its own investigation. See S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (Oct. 6, 1992), reprinted in 2 Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* 145 (1995).

5. See S.C. Res. 827, *supra* note 4, para. 1. The Statute of the International Tribunal [hereinafter *Tribunal Statute*] is set out as an annex to the Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993), reprinted in 32 I.L.M. 1163 (1993) [hereinafter *Report of the Secretary-General*].

6. See S.C. Res. 827, *supra* note 4, para. 4. For a useful analysis of the creation, structure, and jurisdiction of the Tribunal, see James C. O'Brien, *Current Developments, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 *Am. J. Int'l L.* 639 (1993).

7. See *Tribunal Statute*, *supra* note 5, arts. 12, 31. The Tribunal may sit elsewhere if necessary to serve the interests of justice. See Rules of Procedure and Evidence, rule 4, U.N. Doc. IT/32, (Mar. 14, 1994), reprinted in 33 I.L.M. 493 (1994) [hereinafter *Rules of Procedure*].

8. *Tribunal Statute*, *supra* note 5, art. 13.

nationals of the same State.⁹ There are two Trial Chambers composed of three judges each, along with one Appeals Chamber composed of five judges.¹⁰ The judges elect a President who handles administrative matters and presides over the Appeals Chamber.¹¹ The Rules of Procedure establish that judges will periodically rotate among these chambers.¹²

The Statute also creates a Prosecutor and a Registry. These, together with the Chambers, constitute the three organs of the Tribunal. In terms of respective administrative and legal functions, the role of the prosecutor is defined in article 16(1). This article provides that the Prosecutor "shall be responsible for the investigation and prosecution" of crimes falling under the Tribunal's jurisdiction. Similarly, article 16(2) provides that the Prosecutor "shall act independently as a separate organ" of the Tribunal. The first Prosecutor is Richard Goldstone, a highly regarded South African jurist.¹³ Although the Statute does not establish a defense counsel, it does provide for a right to counsel and for appointment of counsel in the event that the accused lacks "sufficient means" to pay for it.¹⁴ The Registry, on the other hand, is responsible for the "administration and servicing" of the Tribunal.¹⁵

Articles 2 through 5 of the Statute establish the subject-matter jurisdiction of the Tribunal. Article 2 provides that the Tribunal has jurisdiction over "grave breaches" of the four Geneva Conventions of 1949, "namely" a series of enumerated acts "against persons or property protected" under the relevant Geneva Convention provisions. Article 3 confers power on the Tribunal to prosecute persons "violating the laws or customs of war," including but not limited to a list of violations culled from the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws

9. Id. art. 12.

10. Id. art. 11(a).

11. Id. art. 14. The Tribunal's first and current President is Antonio Cassese, an Italian scholar who specializes in international criminal law. For a list of the Tribunal's personnel, see Press Communiqué, U.N. Doc. IT/13, Nov. 30, 1993, reprinted in 2 Morris & Scharf, *supra* note 4, at 645.

12. See Rules of Procedure, *supra* note 7, rule 27.

13. Goldstone's prestige is so great that when he accepted the job of Prosecutor, President Cassese reportedly faxed to the tribunal judges a traditional message marking papal succession: "*Habemus papum!*" ("We have a pope!"). See William W. Horne, *The Real Trial of The Century*, *American Law.*, Sept. 1995, at 5, 55. Goldstone is scheduled to be replaced by Louise Arbour, a Canadian jurist, in the fall of 1996.

14. Tribunal Statute, *supra* note 5, art. 21(4)(d).

15. Id. art. 17(1).

and Customs of War on Land.¹⁶ Article 4 confers jurisdiction over acts of genocide, defined as any of a set of enumerated acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."¹⁷ Finally, article 5 covers crimes against humanity, including a set of enumerated crimes "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."¹⁸

The Tribunal got off to a slow start. The process of choosing judges and a Prosecutor took longer than expected, and, even after this process was complete, funding difficulties complicated efforts to assemble a staff for the Prosecutor. For the first year of its existence, the Tribunal had no pending cases. By the end of 1994, the Prosecutor had sought several indictments, all of which were confirmed by the Tribunal. Eventually the Prosecutor obtained indictments of dozens of individuals, including Bosnian Serb leader Radovan Karadzic and General Ratko Mladic. Nevertheless, as 1995 commenced, the Tribunal still had no defendants in custody.¹⁹

II. *PROSECUTOR V. TADIC*: THE TRIAL CHAMBER

Dusko Tadic, a Bosnian Serb, owned a cafe in the Prijedor district in northwest Bosnia and worked as a part-time karate instructor. He had also served in the reserve militia and as a policeman in the Kozarac area. Although he reportedly had a good relationship with local Muslims before the war, when ethnic tensions increased in the early 1990s, he banned Muslims from his cafe.²⁰ Thereafter, according to the Prosecutor, Tadic participated directly in a series of increasingly inhuman acts against Bosnian Muslims.²¹

Tadic is said to have helped create death lists of Muslim intellectuals from the Kozarac area.²² Eyewitnesses say he was personally involved in the forced removal of Muslims from the villages in the Prijedor area and in the looting of homes there.²³ He often wore a

16. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention IV].

17. Tribunal Statute, *supra* note 5, art. 4.

18. *Id.* art. 5.

19. See generally Horne, *supra* note 13 (describing the early days of the Tribunal).

20. See Application for Deferral by the Federal Republic of Germany in the Matter of Dusko Tadic [hereinafter Application for Deferral], Annex MK1, para. 6.2 (Declaration of Michael J. Keegan, Oct. 11, 1994) [hereinafter Keegan Declaration]. This material is available on the Tribunal's Web Site, *supra* note 2.

21. See Keegan Declaration, *supra* note 20, paras. 6.2-6.8.

22. See *id.* para. 6.3.

23. See *id.* para. 6.4.

military uniform and was "noticeably in charge" of groups engaged in ethnic cleansing and torture and murder of prisoners in camps.²⁴ Witnesses claim he summarily executed several unarmed non-Serbs as they were leaving their villages in compliance with Serb demands.²⁵ Witnesses at the Trnopolje camp, a camp for women, report that he was involved in the raping of Muslim women on more than one occasion.²⁶

The most serious charges against Tadic stem from his actions at the notorious Omarska camp, which housed relatively prominent Muslim men. Eyewitnesses place him at the camp almost every night from late-May to mid-August 1992.²⁷ He beat and tortured prisoners daily.²⁸ Prosecutors say he is personally responsible for the murder of more than ten persons.²⁹ One particularly gruesome set of murders was one of the "most widely witnessed."³⁰ In June 1992, Tadic and others, using knives, truncheons, and metal rods, beat and tortured three prisoners to the point of unconsciousness. According to prosecutors, "Tadic then forced a fourth prisoner to drink motor oil from the garage and then bite off the testicles of the unconscious prisoners."³¹ The three prisoners died as a result of the torture.³²

Tadic eventually traveled to Germany, where he was arrested by German authorities and charged with crimes relating to his activities in Bosnia. Thereafter, the Tribunal requested from Germany a deferral of jurisdiction, pursuant to article 9(2) of the Tribunal Statute, which grants the Tribunal primacy over national courts and permits the Tribunal to request national courts to defer to the Tribunal.³³ On February 13, 1995, the Tribunal indicted Tadic and another Bosnian Serb, Goran Borovnica, for grave breaches of the Geneva Conventions, war crimes, and crimes against humanity.³⁴

24. See *id.*

25. See *id.*

26. See *id.* paras. 6.3-6.6.

27. See *id.* para. 6.5, 6.7.

28. See *id.* para. 6.7.

29. See *id.*

30. See *id.*

31. *Id.*

32. See *id.* For a description of life in the Omarska concentration camp, see, e.g., Rezak Hukanovic, *The Evil at Omarska*, in *The New Republic*, Feb. 12, 1996, at 24. For more on ethnic cleansing in Prijedor, see Roy Gutman, *A Witness to Genocide* (1993).

33. See Application for Deferral, *supra* note 20, para 4; Horne, *supra* note 13, at 61.

34. See Indictment, *Prosecutor v. Tadic*, Feb. 13, 1995, available electronically at gopher://gopher.igc.apc.org:7030/00/cases/Tadic/950213-Tadic-indictment. See also Horne, *supra* note 13, at 61. The indictment was later amended to include crimes Tadic allegedly

Subsequently, on June 23, 1995, Tadic's attorneys filed a preliminary motion to dismiss all charges for lack of jurisdiction.³⁵ The defense based its motion on three distinct arguments: (1) the Security Council resolution establishing the Tribunal was invalid; (2) the Statute's grant of primacy to the Tribunal over national courts violated international law; and (3) the Tribunal lacked subject-matter jurisdiction because its Statute applies only to crimes committed in connection with an international (rather than an internal) armed conflict. The Trial Chamber of the Tribunal heard oral arguments on the motion on July 25 and 26, 1995.³⁶

On August 10, 1995, the Trial Chamber denied the defense's motion to dismiss.³⁷ The Chamber first considered Tadic's claim that the Security Council resolution establishing the Tribunal was *ultra vires*, or outside the scope of U.N. authority granted by international law. The Chamber observed that the Tribunal "is not a constitutional court set up to scrutinise the actions of organs of the United Nations" and suggested that it has "no authority to investigate the legality of its creation by the Security Council."³⁸ The Chamber added, however, that it was important that the Tribunal "be viewed as legitimate," and thus concluded that it would be "inappropriate to dismiss without comment" the challenge to the Security Council's authority.³⁹ The Trial Chamber went on to uphold the Council resolution as a valid exercise of the Council's powers under Chapter VII of the U.N. Charter. The Chamber first endorsed the Council's conclusion that violations of humanitarian law in the former Yugoslavia constituted a "threat to the peace" justifying sanctions under Chapter VII.⁴⁰ The Chamber then concluded that the particular enforcement measure chosen, in this case

committed at the Keraterm camp, which housed less prominent Muslim men. See Keegan Declaration, *supra* note 20, paras. 5.1-5.7 (for a description of Keraterm and other camps).

35. Tadic relied on rule 73(A)(i) of the Rules of Procedure, *supra* note 7, which permits the defense to object to proceedings for lack of jurisdiction. Tadic's attorneys were Michail Wladimiroff of the Netherlands, Milan Vujin, a Bosnian Serb attorney, and one Krstan Simic. For more on the defense lawyers, see Horne, *supra* note 13, at 56, 62.

36. The Trial Chamber consisted of Presiding Judge Gabrielle Kirk MacDonald of the United States, Judge Ninian Stephen of Australia, and Judge Lal Chand Vohrah of Malaysia.

37. See Decision of the Trial Chamber, *supra* note 3.

38. *Id.* para. 5.

39. *Id.* para. 6.

40. *Id.* para. 16. The Chamber also suggested that the Security Council's conclusion on this matter was "not a justiciable issue but one involving considerations of high policy and of a political nature." *Id.* para. 23. See also *id.* para. 24 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

establishment of the Tribunal itself, was within the Council's broad powers under Chapter VII, since the list of economic and military measures in article 41 is "not exhaustive."⁴¹

The Trial Chamber also rejected the defense's contention that the Tribunal's Statute violates international law because it confers primacy on the Tribunal over national courts. Here, the Chamber concluded that Tadic lacked standing to press this issue. The Chamber noted that the two States "most closely affected" by the indictment of Tadic, Germany and Bosnia, supported prosecution of Tadic in the Tribunal.⁴² The Chamber added that the indictment charges Tadic with "universal" crimes that "shock the conscience of all nations of the world,"⁴³ and thus were "never crimes within the exclusive jurisdiction of any individual State."⁴⁴

Next, the Trial Chamber held that the Tribunal Statute applies to war crimes in the former Yugoslavia regardless of whether they were committed in the course of international or internal armed conflict. First, the Chamber held that article 2 of the Tribunal Statute, which covers "grave breaches" of the Geneva Conventions, applies regardless of whether the grave breaches occur in international or internal armed conflict, even though the "grave breach" provisions of the Conventions apply only in international armed

41. Id. para. 28. The Chamber also suggested that the Tribunal would promote peace in the region by deterring further human rights abuses and by helping to defuse ethnic tensions in the region. See id. paras. 30-31.

In addition, the Chamber rejected the defense's contention that the establishment of the Tribunal violated article 14 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, which provides that an accused has the right to be tried by a tribunal "established by law." The Chamber concluded that this argument was "but another way of expressing the general complaint that the creation of the International Tribunal was beyond the power of the Security Council." See Decision of the Trial Chamber, *supra* note 3, para. 33.

The Chamber also rejected the defense's argument that Article 29 of the U.N. Charter does not authorize the Council to establish an international judicial body. The Tribunal noted that Article 29, which the Tribunal erroneously located in Chapter VI, is worded very broadly; it provides that the Council "may establish such subsidiary organs" as it deems necessary. In any event, the Tribunal concluded that the Council had acted pursuant to Chapter VII of the U.N. Charter, not Article 29. See id. para. 35.

Finally, the Chamber rejected arguments that it was inappropriate for the Security Council to establish personal criminal liability, see id. para. 36, that the Tribunal's creation violated the principle of *jus de non evocando* (regularly established courts), see id. para. 37, that the General Assembly should have been involved in its creation, see id. para. 38, and that the Tribunal's statute improperly denies the accused any recourse to the Human Rights Committee or the European Commission of Human Rights, see id. para. 39.

42. Id. para. 41.

43. Id. para. 42.

44. Id. para. 43.

conflict. The Chamber stressed that "the requirement of international conflict does not appear on the face of Article 2"⁴⁵ of the Tribunal Statute and concluded that article 2 is "self-contained rather than referential."⁴⁶ Although the Chamber added that "there are clear indications . . . that the acts alleged in the indictment were in fact committed in the course of an international armed conflict," it nevertheless made no finding on this question.⁴⁷

The Chamber also adopted a broad interpretation of article 3 of the Tribunal Statute, which confers on the Tribunal the power to "prosecute persons violating the laws or customs of war." The defense argued that this provision is based on the fourth Hague Convention,⁴⁸ which applies only to international armed conflict and which was cited by the Secretary-General in his report on the provision.⁴⁹ The Chamber rejected this contention, noting that the text of article 3 itself does not mention the Hague Convention.⁵⁰ Asserting that the provision was intended as a codification of customary international law, the Chamber argued that customary humanitarian law covers both international and internal armed conflicts.⁵¹ The Chamber also accepted the Prosecutor's argument that article 3 of the Tribunal Statute incorporates Common Article 3 of the Geneva Conventions, which prohibits serious crimes committed in the context of internal armed conflict.⁵²

45. Id. para. 50.

46. Id. para. 49.

47. Id. para. 53.

48. Hague Convention IV, *supra* note 16, art. 3.

49. See Report of the Secretary-General, *supra* note 5, paras. 41-44.

50. See Decision of the Trial Chamber, *supra* note 3, para. 59.

51. See *id.* paras. 60-63. In support of this proposition, the Chamber cited the 1863 Lieber Code, which sought to regulate the conduct of U.S. armed forces during the American Civil War, as well as the traditional rule that the customary law of war applies to civil war when the rebels become recognized as belligerents. *Id.* para. 63. The Chamber also noted that the International Law Commission's Draft Code on Crimes Against The Peace and Security of Mankind defines "exceptionally serious war crimes" without distinguishing between international and non-international armed conflict. *Id.*

52. See *id.* paras. 65-73. Common Article 3 is incorporated as part of each of the four 1949 Geneva Conventions. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 3116-18, 75 U.N.T.S. 31, 32-34; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220-22, 75 U.N.T.S. 85, 86-88; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318-20, 75 U.N.T.S. 135, 136-38; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518-20, 75 U.N.T.S. 287, 288-290. The Chamber added that the Tribunal Statute did not violate the *ex post facto* prohibition of art. 15(1) of the International Covenant on Civil and Political Rights because it adopted provisions that were already

Finally, the Chamber affirmed that article 5 of the Tribunal Statute covers crimes against humanity in the context of any armed conflict, whether international in scope or not. The Chamber rejected the defense's argument that article 5 violated the principle of *nullum crimen sine lege* (*ex post facto* laws) because it extended to crimes against humanity in the context of internal armed conflict. The Chamber conceded that the Nuremberg Tribunal had adopted the defense's definition, but the Chamber asserted that in the fifty years since Nuremberg, customary international law has removed any requirement of a nexus between a crime against humanity and *any* armed conflict.⁵³ Thus, in the view of the Trial Chamber, the definition of article 5 "is in fact more restrictive" than that of customary international law because article 5 requires a nexus with some sort of armed conflict.⁵⁴

Accordingly, the Chamber held it had subject-matter jurisdiction over all the counts of the indictment against Tadic. Having also rejected the defense's challenges to the validity and primacy of the Tribunal, the Chamber denied Tadic's motion to dismiss. Tadic immediately appealed.

III. PROCEEDINGS IN THE APPEALS CHAMBER

On October 2, 1995, the Appeals Chamber of the Tribunal affirmed the ruling of the Trial Chamber, with several revisions.⁵⁵ The Chamber first rejected the Prosecutor's argument that the Trial Chamber's decision was unappealable because it did not relate to jurisdiction.⁵⁶ The Appeals Chamber ruled that "[s]uch a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially

"beyond doubt part of customary international law." Decision of the Trial Chamber, *supra* note 3, para. 72. Moreover, Yugoslav law itself had outlawed war crimes against the civilian population in "situations of 'war, armed conflict or occupation,' irrespective of the nature of the conflict, thus implying that situations of non-international armed conflict could be covered." *Id.* para. 73.

53. *Id.* paras. 78-83.

54. *Id.* para. 83.

55. Decision of the Appeals Chamber, *supra* note 2. At the time of the decision, the Appeals Chamber consisted of Presiding Judge Cassese, Judge Li Haopei of China, Judge Jules Deschênes of Canada, Judge Georges Michel Abi-Saab of Egypt, and Judge Rustam S. Sidhwa of Pakistan.

56. *Id.* paras. 4-6. See Rules of Procedure, *supra* note 7, rule 72(B) (authorizing interlocutory appeal in the case of "dismissal of an objection based on lack of jurisdiction").

lengthy, emotional and expensive trial.”⁵⁷ The Chamber added: “What is this, if not in the end a question of jurisdiction?”⁵⁸

The Appeals Chamber then turned to the first of the three substantive issues decided in the Chamber below—namely, the question of the legitimacy of the Tribunal itself. Like the Trial Chamber, the Appeals Chamber initially asserted that the Tribunal is not a constitutional court: “There is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own ‘creator.’”⁵⁹ The Appeals Chamber, following the example of the Trial Chamber, nonetheless felt obliged to address the legality of the Council’s action as a matter of its “incidental” jurisdiction necessary to “ascertain and be able to exercise its ‘primary’ jurisdiction over the matter before it.”⁶⁰ Unlike the Trial Chamber, however, the Appeals Chamber rejected the Prosecution’s argument that the validity of the relevant Council resolution was a nonjusticiable political question.⁶¹ The Appeals Chamber asserted that the International Court of Justice has “consistently rejected this argument as a bar to examining a case. It considered it unfounded in law.”⁶²

With this reasoning, the Chamber proceeded to the underlying merits of the argument, and ultimately affirmed the Trial Chamber’s holding that the establishment of the Tribunal was not *ultra vires* the U.N. Charter.⁶³ First, the Appeals Chamber expressed its view that the Security Council had properly found a “threat to the peace” within the meaning of Article 39 of the Charter—a finding Tadic had not challenged on appeal.⁶⁴ Next, it sustained the Trial Chamber’s holding that the measures in Article 41 “are merely

57. See Decision of the Appeals Chamber, *supra* note 2, para. 6.

58. *Id.*

59. *Id.* para. 20.

60. *Id.* para. 21 (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (June 21) [hereinafter *Advisory Opinion on Namibia*]).

61. *Id.* para. 24.

62. *Id.* The Chamber relied in particular on language from the *Certain Expenses* advisory opinion: “It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. . . . The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.” *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 155 (July 20), quoted in Decision of the Appeals Chamber, *supra* note 2, para. 24.

63. Decision of the Appeals Chamber, *supra* note 2, paras. 28-48.

64. *Id.* paras. 28-30.

illustrative *examples* which obviously do not exclude other measures. All the Article requires is that they do not involve 'the use of force.'⁶⁵ Finally, like the Trial Chamber below, the Appeals Chamber found that the establishment of the Tribunal did not violate the human rights principle, codified in the International Covenant on Civil and Political Rights, that courts must be "established by law."⁶⁶ Accordingly, the Appeals Chamber dismissed the first ground of appeal, thus settling the question of the Tribunal's legitimacy.⁶⁷

The Appeals Chamber next turned to the validity of article 9 of the Tribunal Statute, which confers primacy on the Tribunal as against national courts.⁶⁸ On appeal, Tadic had argued that the Trial Chamber should have refused to proceed because Tadic was "at trial" in Germany,⁶⁹ and article 10 of the Tribunal Statute generally forbids prosecution by the Tribunal if the accused has already been "tried by a national court."⁷⁰ Noting that the German proceeding had been in the investigation phase, not in trial, the Appeals Chamber concluded that Tadic's contentions on this point "lose all merit."⁷¹ Still, the Appeals Chamber rejected the Trial Chamber's conclusion that Tadic lacked standing to challenge the Tribunal's primacy on grounds of state sovereignty.⁷² The Appeals Chamber held that Tadic "cannot be deprived of a plea so intimately connected with, and grounded in, international law."⁷³ The Appeals Chamber nonetheless held that the Tribunal's primacy does not offend state sovereignty.⁷⁴ The Chamber observed that the Security Council had acted pursuant to Chapter VII of the U.N. Charter and that Article 2(7) of the Charter makes an explicit

65. *Id.* para. 35. The Appeals Chamber also found that the Security Council had the power to establish a subsidiary organ with judicial powers, *id.* paras. 37-38, and that the Council had discretion to choose this rather than other measures to address the threat to the peace in the former Yugoslavia, *id.* paras. 39-40.

66. *Id.* paras. 46-47; see also *id.* paras. 41-45 (elaborating on the meaning of "established by law" as applied to the Tribunal).

67. *Id.* para. 48.

68. See Tribunal Statute, *supra* note 5, art. 17 (establishing the jurisdiction of the Tribunal).

69. See Decision of the Appeals Chamber, *supra* note 2, para. 51.

70. Tribunal Statute, *supra* note 5, arts. 17-18.

71. Decision of the Appeals Chamber, *supra* note 2, para. 52.

72. *Id.* para. 55.

73. *Id.*

74. *Id.* para. 56.

exception for enforcement measures under Chapter VII.⁷⁵ Like the Trial Chamber, the Appeals Chamber stressed that the universal nature of the crimes involved strengthens the case for primacy of the Tribunal over national courts.⁷⁶ The Chamber thus dismissed Tadic's objection to the Tribunal's primacy.⁷⁷

The bulk of the Appeals Chamber's opinion is devoted to the final ground for Tadic's appeal, his claim that the Tribunal lacked jurisdiction because the alleged crimes were committed in the context of an internal armed conflict. The Chamber rejected Tadic's suggestion that no armed conflict existed at all at the time of the offenses in question.⁷⁸ It then turned to the central issue of subject-matter jurisdiction: whether the Statute covers crimes committed in internal armed conflict. The Appeals Chamber suggested that any ambiguity in the Tribunal Statute should be read in light of the Security Council's purpose in establishing the Tribunal, which was to punish war crimes "without reference to" the nature of the conflict.⁷⁹ It then addressed each particular provision of the Tribunal Statute at issue.

The Appeals Chamber reversed the Trial Chamber's holding that article 2 of the Tribunal Statute, which covers "grave breaches" of the Geneva Conventions, covers crimes occurring in the context of both internal and international armed conflict.⁸⁰ Stressing that article 2 is expressly limited to acts against "persons or property" protected under the relevant Geneva Convention, the Appeals

75. Id. paras. 55-56 (citing U.N. Charter art. 2, para. 7 (preventing the United Nations from intervening in matters which are within a state's domestic jurisdiction)).

76. See id. paras. 57-60. The Chamber also rejected Tadic's claim that the Tribunal deprived him of a "right to be tried by his national courts under his national laws." Id. para. 61. The Chamber could not find such a right in the major international human rights instruments, and it held that relevant provisions of several national constitutions did not bar his trial before an international tribunal with sufficient procedural safeguards. See id. paras. 61-62.

77. Id. para. 64.

78. Id. paras. 66-70. The question is relevant because international humanitarian law, the substantive law of the Tribunal, generally applies only to armed conflicts. See id. para. 67.

Tadic argued that the armed conflict was not raging at the scene of the alleged crimes when they were committed. Id. para. 66. The Appeals Chamber concluded that the crimes nonetheless did take place in the "context" of armed conflict. Id. para. 70. It was enough that the crimes were "closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict," even if the hostilities were not raging at the precise scene of the crime. Id.

79. Id. para. 72. According to the Appeals Chamber, the Security Council and the parties to the hostilities have repeatedly recognized that the conflict was both internal and international. See id. paras. 72-77.

80. Id. para. 84. See also id. paras. 79-85 (discussing article 2 of the Tribunal Statute).

Chamber concluded that under the Conventions, persons and property are protected "only to the extent that they are caught up in an international armed conflict."⁸¹

The Appeals Chamber affirmed the Trial Chamber's holding that article 3 of the Tribunal Statute, which covers violations of the "laws or customs of war,"⁸² applies in both international and internal armed conflict.⁸³ The Chamber observed that the article was intended to "reference" the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land.⁸⁴ The Chamber reasoned, however, that article 3 of the Tribunal Statute was not limited to international law established through the Hague Convention (i.e., Hague Law) because the list of offenses in article 3 is merely illustrative, not exhaustive.⁸⁵ Indeed, the Appeals Chamber asserted that article 3 covers "all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions," the latter already being covered by article 2.⁸⁶ The Appeals Chamber concluded that article 3 covers violations of Hague law, infringements of Geneva law other than "grave breaches," violations of relevant agreements among the parties, and violations of Common Article 3 of the Geneva Conventions, which covers certain conduct committed in non-international armed conflict.⁸⁷ In other words, article 3 "functions as a residual

81. Id. para. 81. The Chamber noted that some national courts have treated "grave breaches" as encompassing crimes in internal conflict, and that the United States as *amicus curiae* had endorsed that position. Id. para. 83. Although the Appeals Chamber sensed "the first indication of a possible change in *opinio juris* of States," id., it nonetheless concluded that article 2 of the Tribunal Statute is still restricted to international conflicts "in the present state of development of the law." Id. para. 84.

82. Article 3 of the Tribunal Statute, *supra* note 5, provides:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

83. Decision of the Appeals Chamber, *supra* note 2, paras. 87-91.

84. Id. para. 87.

85. Id.

86. Id.

87. Id. para. 89.

clause designed to ensure that no serious violation of international humanitarian law" escapes the Tribunal's jurisdiction.⁸⁸ Thus, "[a]rticle 3 aims to make such jurisdiction watertight and inescapable."⁸⁹

The Appeals Chamber then turned to Tadic's claim that customary international law—the "customs of war" mentioned by article 3 of the Tribunal Statute—does not extend humanitarian law to internal strife. While acknowledging that traditional international law did sharply distinguish between belligerency and insurgency, the Chamber argued that the distinction has "blurred" since the 1930s.⁹⁰ The Chamber cited extensive examples of state practice in support of its position.⁹¹ It concluded that "customary rules have developed to govern internal strife,"⁹² though it conceded that only "the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."⁹³ The Chamber also held that customary international law recognized that such rules entail individual criminal responsibility.⁹⁴

Finally, the Appeals Chamber noted that Tadic had abandoned his *ex post facto* challenge to article 5 of the Statute, which covers crimes against humanity when "committed in armed conflict, whether international or internal in character."⁹⁵ The Appeals Chamber nonetheless declared that "[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict."⁹⁶ Accordingly, the Appeals Chamber affirmed the Trial Chamber's dismissal of this and similar challenges to the Tribunal's subject-matter jurisdiction,⁹⁷ thus clearing the way for the trial.⁹⁸

Several Judges appended separate opinions to the decision. Judge Li argued that the Tribunal lacked the power of incidental

88. *Id.* para. 91.

89. *Id.* The Chamber emphasized that its reading of article 3 extends only to "serious" violations of humanitarian law. *Id.* para. 94(iii). As an example, the Chamber suggested that stealing a loaf of bread in an occupied village would not amount to a "serious" violation, even though it might violate art. 46(1) of the Hague Regulations. *Id.*

90. *Id.* paras. 96-97.

91. See *id.* paras. 98-125.

92. *Id.* para. 127.

93. *Id.* para. 126.

94. See *id.* paras. 128-136.

95. *Id.* para. 139 (quoting Tribunal Statute, *supra* note 5, art. 5).

96. *Id.* para. 141.

97. *Id.* para. 145. Four Judges joined in the decision. Judge Sidhwa dissented. *Id.* para. 146.

98. See *id.* para. 145.

review of the Security Council resolution establishing the Tribunal.⁹⁹ Dissenting from the majority's holding that article 3 of the Tribunal Statute governs internal armed conflict,¹⁰⁰ Judge Li also argued that the armed conflict in the former Yugoslavia was international in character.¹⁰¹ In his separate opinion, Judge Abi-Saab joined in the gist of the majority opinion, but expressed some concerns about the majority's reasoning on subject-matter jurisdiction, particularly regarding the scope of article 2 of the Tribunal Statute.¹⁰² In a lengthy opinion, Judge Sidhwa dissented from the majority's holding that the Tribunal had subject-matter jurisdiction over the case.¹⁰³ Judge Deschênes filed a declaration concurring in the majority opinion but lamenting that the opinion was published only in English, and not simultaneously in French.¹⁰⁴

IV. ANALYSIS

A. *The Legitimacy of the Tribunal*

The first issue in the case, whether to review the validity of the establishment of the Tribunal itself, seems to have confounded the Tribunal. On the one hand, the Tribunal repeatedly intoned the mantra that it lacks a power of judicial review. The Trial Chamber declared that the Tribunal "is not a constitutional court,"¹⁰⁵ and the Appeals Chamber insisted that "[t]here is no question, of course, of the International Tribunal acting as a constitutional tribunal, reviewing the acts of the other organs of the United Nations, particularly those of the Security Council, its own 'creator.'"¹⁰⁶ On the other hand, both Chambers went on to discuss the validity of the relevant Council resolution anyway. The Trial Chamber devoted seven full paragraphs of dicta to the proposition that the Security

99. See Decision of the Appeals Chamber, *supra* note 2, Separate Opinion of Judge Li, paras. 2-4.

100. See *id.* at Separate Opinion of Judge Li, paras. 5-13.

101. See *id.* at Separate Opinion of Judge Li, para. 17.

102. See *id.* at Separate Opinion of Judge Abi-Saab at 1, 4-6.

103. See *id.* at Separate Opinion of Judge Sidhwa, paras. 95-120.

104. See *id.* at Separate Declaration of Judge J. Deschênes, paras. 1-3.

105. See Decision of the Trial Chamber, *supra* note 3, para. 5. The Trial Chamber added that the Tribunal is "a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." *Id.* See also *id.* para. 11 (quoting *Advisory Opinion on Namibia*, 1971 I.C.J. at 23, which supports the proposition that the International Court of Justice lacks a power of judicial review).

106. Decision of the Appeals Chamber, *supra* note 2, para. 20.

Council's action was a valid exercise of its enforcement power under Chapter VII of the U.N. Charter.¹⁰⁷ Similarly, the Appeals Chamber found that it had a power of "incidental" jurisdiction to review the validity of the Council resolution, and it upheld the resolution as a valid enforcement measure.¹⁰⁸ The Tribunal thus behaved much like the International Court of Justice, which has denied its own power of judicial review even while exercising it.¹⁰⁹

The Appeals Chamber's decision raises several interesting questions. The Appeals Chamber pointed out that an international tribunal normally has an inherent power to determine its own jurisdiction, known as *la compétence de la compétence* or *Kompetenz-Kompetenz*.¹¹⁰ This principle of international law stems from the practice of arbitral tribunals, which often have the power to decide challenges to their own jurisdiction, perhaps including challenges to the validity of the underlying contract or *compromis* itself.¹¹¹ *Compétence de la compétence* ensures that the parties have a forum for challenging the jurisdiction of the arbitral tribunal.¹¹² Even if another forum for such a challenge exists, *compétence de la compétence* allows the parties to avoid time-consuming and costly referrals to that forum.¹¹³

Likewise, the Tribunal's decision in the Tadic case helped ensure that the Tribunal's legitimacy was tested somewhere. Tadic had a chance to challenge the Tribunal's legitimacy—an opportunity he would not have had otherwise.¹¹⁴ As Tadic pointed out, human

107. See Decision of the Trial Chamber, *supra* note 3, paras. 16-22. The Trial Chamber introduced this excursion with one more disclaimer on judicial review: "Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that . . . the Security Council did not act arbitrarily." *Id.* para. 16.

108. See Decision of the Appeals Chamber, *supra* note 2, paras. 18-20 (citing *Nottebohm Case* (Liech. v. Guat.), 1953 I.C.J. 7, 119 (March 21)).

109. See, e.g., *Advisory Opinion on Namibia*, 1971 I.C.J. at 45 (asserting that the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs involved, but then proceeding to review those decisions anyway).

110. See Decision of the Appeals Chamber, *supra* note 2, paras. 18-19. See generally Ibrahim F.I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction* (1965).

111. See Shihata, *supra* note 110, at 24-46.

112. See *id.* at 26.

113. See *id.*

114. Tadic lacks the authority to bring either a contentious or advisory case before the International Court of Justice for review of the Council resolution. See U.N. Charter art. 96, para. 2 (providing that only certain U.N. organs may seek advisory opinions); Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059, 3 Bevans 1179, 1186 (providing that only states may be parties in "cases" before the Court).

rights law requires trial by a tribunal "established by law."¹¹⁵ The question arises, however, whether this human-rights principle is vindicated when the Tribunal, sitting in its own cause, declares itself legitimate. Moreover, other (admittedly weak) avenues of review already exist. For example, states and international organizations have some limited power to challenge the validity of Security Council resolutions such as the one establishing the Tribunal. There is the possibility of judicial review by the International Court, either in a contentious case or an advisory proceeding.¹¹⁶ Of course, such review has thus far been quite deferential.¹¹⁷ Another possibility, admittedly quite dim in this case, is political persuasion. The Federal Republic of Yugoslavia, for instance, sent a letter to the Security Council challenging the legal basis for creation of the Tribunal.¹¹⁸ Still, the Tribunal's decision made review a certainty, not just a possibility. In this sense the decision adhered to the rationales behind the doctrine of *compétence de la compétence*.¹¹⁹

Nonetheless, it is one thing to say that an arbitral panel may rule on its own jurisdiction and perhaps on the validity of an arbitration agreement between private parties; it is quite another to say that a subsidiary organ may pass on the validity of a resolution of the U.N. Security Council, the "top dog" in international law. Even the principal judicial organ of the United Nations, the International Court of Justice, has treated judicial review like a contagious disease.¹²⁰ And history's most famous war crimes tribunal, the Nuremberg Tribunal, prospered without permitting challenges to

115. Decision of the Appeals Chamber, *supra* note 2, para. 41 (quoting International Covenant on Civil and Political Rights, *supra* note 41, art. 14).

116. Cf. U.N. Charter art. 92 (providing that the International Court is the "principal judicial organ" of the United Nations). On judicial review, see generally Jose E. Alvarez, Judging the Security Council, 90 Am. J. Int'l L. 1 (1996); Geoffrey R. Watson, Constitutionism, Judicial Review, and the World Court, 34 Harv. Int'l L.J. 1 (1993); W. Michael Reisman, The Constitutional Crisis in the United Nations, 87 Am. J. Int'l L. 83 (1993); Thomas M. Franck, The Powers of "Appreciation:" Who is the Ultimate Guardian of UN Legality, 86 Am. J. Int'l L. 519 (1992).

117. See Geoffrey R. Watson, *supra* note 116, at 28.

118. See Letter from the Charge d'Affaires A.I. of the Permanent Mission of Yugoslavia to the Secretary-General (May 19, 1993), U.N. Doc. A/48/170, S/25801, reprinted in 2 Morris & Scharf, *supra* note 4, at 479. It obviously did not succeed.

119. See Shihata, *supra* note 110, at 24-26.

120. Indeed, the Court has not made it entirely clear whether it has a power of judicial review at all. See generally Watson, *supra* note 116, at 14-28 (surveying the Court's practice). It has never struck down a Council resolution as *ultra vires* the U.N. Charter.

its own legitimacy. The Nuremberg Charter provided that the Nuremberg Tribunal could not be "challenged" by the parties.¹²¹

The Appeals Chamber emphasized that the International Court of Justice itself possesses *la compétence de la compétence*, embodied in article 36(6) of the Court's Statute.¹²² Although the Statute of the International Tribunal has no provision like article 36(6), the Appeals Chamber stressed that the Tribunal's Statute does not expressly limit *la compétence de la compétence*. According to the Appeals Chamber, it is "absolutely clear" that no such limitation can be inferred.¹²³ The Chamber alluded to suggestions that the International Court would have *compétence de la compétence* even without article 36(6), and that efforts to strip the Court of such competence might be invalid.¹²⁴

The analogy to the International Court's practice, however, is not conclusive. Even if a norm like article 36(6) is an inherent part of the Tribunal's Statute, such a norm does not necessarily justify the "incidental" power of judicial review exercised by the Tribunal. Article 36(6) has never been cited as authority for "incidental" judicial review of the International Court's Statute or the U.N. Charter. Although article 36(6) may empower the Court to deny validity to so-called "self-judging" reservations in declarations accepting the Court's jurisdiction, it has never been the basis for a challenge to the Court's constitutive instruments.

The International Court precedents cited by the Chamber demonstrate this point. The *Nottebohm* case, for example, did not involve review of the instruments establishing the International Court itself.¹²⁵ Nor was the *Namibia* advisory opinion an example

121. See Charter of the International Military Tribunal, art. 3, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

122. The provision reads: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Statute of the International Court of Justice, art. 36(6), 59 Stat. at 1060, 3 Bevans at 1179, cited in Decision of the Appeals Chamber, *supra* note 2, para. 18. Article 36(6) is "declaratory of international arbitration law." W. Michael Reisman, Has the International Court Exceeded its Jurisdiction?, 80 Am. J. Int'l L. 128, 129 (1986). See also Shihata, *supra* note 110, at 25-26 (asserting that the ICJ possesses *la compétence de la compétence*). Cf. Statute of the United Nations Administrative Tribunal, art. 2(3), U.N. Doc. AT/11/Rev.4 (1972) ("In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal."), quoted in Decision of the Appeals Chamber, *supra* note 2, para. 17.

123. See Decision of the Appeals Chamber, *supra* note 2, para. 19.

124. See *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6, 95 (Mar. 21) (separate opinion of Judge Lauterpacht).

125. *Nottebohm Case*, 1955 I.C.J. at 119.

of the "very same 'incidental' jurisdiction" supposed at issue in Tadic, as the Appeals Chamber tried to suggest.¹²⁶ True, "in the exercise of its judicial function," the ICJ in *Namibia* decided to "consider" objections to the validity of certain General Assembly and Security Council resolutions before assessing the consequences of those resolutions.¹²⁷ But those resolutions had nothing to do with the legitimacy of the Court itself.

The practice of national courts does not necessarily support the Tribunal's conclusion either. Many civil-law states follow a centralized model of judicial review in which a single Constitutional Court passes on the validity of legislation.¹²⁸ In such a system, subsidiary courts lack the supposedly inherent "incidental" jurisdiction described by the Tribunal, which is itself a subsidiary court.¹²⁹ Other states, both common-law and civil-law, do not have any system of judicial review at all.¹³⁰ In such a system, all courts—even the highest courts—lack the "incidental" jurisdiction asserted by the Appeals Chamber. Of course, some states do permit lower courts to invalidate legislation, but those lower courts rarely have declared themselves unconstitutional. One of the most famous instances of judicial review by a national court, *Marbury v. Madison*,¹³¹ did involve judicial review of the 1789 Judiciary Act establishing lower federal courts. But *Marbury* did not purport to review the "validity" of the organic document—the U.S. Constitution—that created the Supreme Court itself. Against this background, the Tribunal's decision to assess its own legitimacy seems novel.

I have argued elsewhere that the International Court can, does, and should exercise judicial review of acts of the Security Council and other United Nations organs.¹³² Nevertheless, that conclusion does not mean that other subsidiary tribunals possess a similar power. The International Court has been reluctant to admit that it

126. Decision of the Appeals Chamber, *supra* note 2, para. 21.

127. *Advisory Opinion on Namibia*, 1971 I.C.J. at 45.

128. See generally Brewer-Carias, *Judicial Review in Comparative Law* (1989).

129. In some such systems, an ordinary court might be required to suspend its proceedings and certify the constitutional question to the Constitutional Court; constitutional review might take place before promulgation of the statute, as is the case in France. See generally Mary Ann Glendon et al., *Comparative Legal Traditions* 73-118 (2d ed. 1994).

130. See *id.* at 468-72 (describing England's resistance to judicial review).

131. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

132. See Watson, *supra* note 116, at 27-28, 43 (arguing for a "Jeffersonian" model of international judicial review).

possesses any power of judicial review at all. Given that reluctance, it seems a bit daring for a subsidiary tribunal to exercise such a power, even if couched as an "incidental" one.

Once the Tribunal decided to assess its own legitimacy, it is not surprising that it validated its own existence. The Appeals Chamber had no trouble upholding the Security Council resolution creating the Tribunal as a valid enforcement measure under Chapter VII. There is little doubt that the situation in the former Yugoslavia during the period in question constituted a "threat to the peace" in the region. Establishment of the Tribunal may not be the best or even a very effective way to restore international peace and security, but the Charter does not require *effective* measures. The list of economic and political sanctions in article 41 is not exclusive. The only real limitation on the Security Council is that its choice of sanctions not involve the use of force.¹³³ The Tribunal's procedural safeguards also satisfy basic requirements of human rights law.

Thus, after two and a half years of operation, the Tribunal has validated its own existence. This Bosnian Serb's effort to invalidate a Security Council resolution was no less doomed than the Bosnian government's effort to invalidate a Security Council resolution imposing an embargo on Bosnia.¹³⁴ The theme of these and other examples of international judicial review is the same: Review is impossible in theory and deferential in fact.¹³⁵

B. *Primacy of the Tribunal*

The Trial and Appeals Chambers both dismissed Tadic's challenge to the primacy of the Tribunal over national courts. Again, however, they reached the proper result in different ways. The Trial Chamber concluded that Tadic lacked standing to assert that the Tribunal's primacy offends state sovereignty.¹³⁶ In support of its conclusion, the Trial Chamber cited *Israel v. Eichmann*,¹³⁷ in which an Israeli court rejected Adolf Eichmann's claim that his capture had violated the sovereignty of Argentina.

133. See 2 Morris & Scharf, *supra* note 4, at 42-43 (arguing that art. 41 includes the power to establish the Tribunal).

134. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia v. Yugo.*), 1993 I.C.J. 325 (Sept. 13).

135. Cf. Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972) (asserting that strict scrutiny is "strict" in theory and "fatal" in fact).

136. See Decision of the Trial Chamber, *supra* note 3, para. 41.

137. *Israel v. Eichmann*, 36 I.L.R. 5 (Dist. Ct. of Jerusalem 1961), *aff'd* 36 I.L.R. 277 (Sup. Ct. of Israel 1962).

The Appeals Chamber acknowledged that *Eichmann* and other decisions of national courts imply that an accused lacks standing to raise violations of state sovereignty.¹³⁸ The appellate body nonetheless held that the "traditional doctrine" unjustly deprives the accused of a plea that is "intimately connected with, and grounded in, international law."¹³⁹ The Appeals Chamber, however, did not specify precisely how the plea is grounded in international law. The Chamber simply asserted that the traditional standing rule had been eroded at the hands of "more liberal forces at work in the democratic societies, particularly in the field of human rights."¹⁴⁰

There is a growing body of authority to support the Appeals Chamber's position. Individuals have standing to raise many provisions in extradition treaties, such as the political offense exception, or the defense of nationality or *non bis in idem*.¹⁴¹ Human rights law may also permit an individual to challenge extradition, even to invoke a provision prohibiting extradition unless the "Requested State" receives "assurances" satisfactory to it that the death penalty will not be carried out.¹⁴² Further, world reaction to the *Alvarez-Machain* decision¹⁴³ suggests that *opinio juris* favors permitting an individual to challenge serious violations of state sovereignty.¹⁴⁴ In light of these sources of authority, the Appeals Chamber's decision on standing seems justifiable.

Having allowed Tadic to raise state sovereignty, the Appeals Chamber was right to dismiss his claim on the merits. Neither Germany nor Bosnia had objected to the Tribunal's jurisdiction over Tadic. Moreover, as both Chambers pointed out, the crimes

138. See Decision of the Appeals Chamber, *supra* note 2, para. 55 (citing *Eichmann*, 36 I.L.R. at 62, and *United States v. Noriega*, 746 F. Supp. 1506, 1533 (S.D. Fla. 1990)).

139. *Id.*

140. *Id.*

141. See, e.g., *In re Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984) (political offense); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) (nationality). Of course, extradition practice is not uniform; fugitives may lack standing, for example, to invoke the rule of speciality. See Restatement (Third) of the Foreign Relations Law of the United States §477 cmt. b (1986) (noting that case law on this point is "not consistent") [hereinafter Restatement]. Similarly, Mutual Legal Assistance Treaties sometimes provide that only states, not individuals, may make requests for evidence or other legal assistance. See, e.g., Treaty on Mutual Assistance in Criminal Matters, Mar. 19, 1986, U.S.-Thail., S. Treaty Doc. No. 18, 100th Cong., 2d Sess., Dep't S. Bull. 5.86 (entered into force June 10, 1993).

142. See *Soering*, 161 Eur. Ct. H.R. (ser. A) at 28-29 (1989).

143. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

144. See, e.g., Andrew L. Wilder, Recent Development, The Supreme Court Decision in *United States v. Alvarez-Machain*, 32 Va. J. Int'l L. 979, 992-93 (describing worldwide criticism of the decision).

alleged are amenable to universal jurisdiction. If any state could prosecute Tadic for his alleged war crimes and crimes against humanity, surely it does not offend state sovereignty that an international tribunal could do so instead.

The Appeals Chamber was also justified in rejecting Tadic's claim that he has a right to be tried by "his national courts under his national laws."¹⁴⁵ Tadic certainly has a right to a fair trial; he is not, however, entitled to demand that he be tried *only* in his home courts. Extraterritorial criminal jurisdiction is a daily fact of life in modern international practice, and universal jurisdiction is now a well-accepted type of extraterritorial jurisdiction.¹⁴⁶

C. *The Scope of Humanitarian Law*

The most difficult issue in the case was Tadic's claim that the Tribunal lacked jurisdiction over the offenses charged because they did not occur in the course of international armed conflict. Tadic's claim was plausible because humanitarian law traditionally covered international armed conflict and only limited aspects of internal armed conflict. The Tribunal's disposition of this issue was unsettling.

The problems began with the Trial Chamber's interpretation of article 2 of the Tribunal's Statute, which covers "grave breaches" of the Geneva Conventions committed against protected persons or property. The Chamber concluded that this provision extends to internal armed conflict. It is hard to square this holding with the language of the Conventions, which define protected persons or property in terms of international armed conflict. Similarly, there is no evidence that the Tribunal's Statute was intended to expand this definition.

The Trial Chamber attempted to bolster its opinion by invoking the Secretary-General's statement that the Tribunal should apply rules of international humanitarian law that are "beyond any doubt part of customary law."¹⁴⁷ It is far from clear, however, that customary law has expanded the scope of the "grave breaches" system to internal armed conflict. Common Article 3 of the Geneva Conventions does apply some basic human rights norms to internal conflict, but not as part of the "grave breach" regime. Moreover,

145. Decision of the Appeals Chamber, *supra* note 2, para. 61.

146. See Restatement, *supra* note 141, §403.

147. Decision of the Trial Chamber, *supra* note 3, para. 51 (quoting Report of the Secretary-General, *supra* note 5, para. 34).

Common Article 3 does not explicitly impose individual criminal liability.¹⁴⁸ It is true, as noted by the Appeals Chamber, that *opinio juris* may be moving toward recognition that grave breaches encompass violations of Common Article 3.¹⁴⁹ Indeed, one can make a good case that the grave breach regime *should* apply to internal armed conflicts. Protection of noncombatants may actually be more urgent in civil war than in international armed conflict, since internal conflict is often as or more vicious than international war. Nonetheless, the Appeals Chamber was correct in finding that state practice has not "beyond any doubt" embraced the Trial Chamber's interpretation.¹⁵⁰ Put differently, the Appeals chamber was right to hold that article 2 of the Tribunal Statute does not extend to internal conflict.

The question remains, however, whether article 3 of the Tribunal Statute applies to internal conflict. Article 3 provides that the Tribunal has the power to prosecute "persons violating the laws or customs of war."¹⁵¹ It adds that such violations "shall include, but not be limited to," a list of activities such as the use of poisonous weapons, the wanton destruction of cities and civilian institutions, and the plunder of property.¹⁵² The Trial Chamber concluded that article 3 applies to international and internal armed conflicts alike.¹⁵³ The Appeals Chamber not only agreed that article 3 applies in both international and internal armed conflict,¹⁵⁴ but also held that article 3 applies to "*all* serious violations" of humanitarian law not covered by other provisions of the Statute.¹⁵⁵ In other words, the view of the Appeals Chamber is that article 3 not only applies to any kind of conflict, but also is a residual clause covering any offense not covered by other provisions of the Statute.

The Tribunal's holding that article 3 extends to civil war is as bold as it is ill-founded. Although the substantive rule is surely a desirable one, the text of the provision does not state explicitly that

148. Common Article 3 dictates that "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," prohibitions on violence. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 52, art. 3.

149. See Decision of the Appeals Chamber, *supra* note 2, para. 83.

150. See *id.* para. 84.

151. Tribunal Statute, *supra* note 5, art. 3.

152. *Id.*

153. Decision of Trial Chamber, *supra* note 3, para. 74.

154. Decision of the Appeals Chamber, *supra* note 2, para. 137.

155. *Id.* para. 92.

it was intended to apply to internal conflict. Article 3 empowers the Tribunal to prosecute persons for violations of the "laws or customs of war,"¹⁵⁶ and it provides that "[s]uch violations shall include, but not be limited to," a variety of offenses relating to the conduct of military operations.¹⁵⁷ The Appeals Chamber itself acknowledged that the phrase "laws or customs of war" is a "term of art used in the past" to describe the traditional law of war, and that the term was used in the Statute "primarily to make reference to the 1907 Hague Convention," which applies only to international armed conflict.¹⁵⁸ Yet the Chamber argued that the provision was also intended to incorporate a more modern customary humanitarian law, of which the Hague Convention was only an "important segment."¹⁵⁹ According to the Chamber, the "merely illustrative" list of offenses in article 3 encompasses other offenses under other conventions.¹⁶⁰ Those other conventions include Common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions, both of which apply to internal armed conflict.¹⁶¹

The list of offenses in article 3 is of course illustrative, but it does not follow that article 3 criminalizes all violations of international humanitarian law, including those conventions that apply to *internal* armed conflict.¹⁶² As the Secretary-General wrote, "the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are *beyond any doubt* part of customary law."¹⁶³ The Secretary-General's list of instruments that had "beyond any doubt" become part of customary international law included the Geneva and Hague Conventions, the Genocide Convention, and the Nuremberg Charter, but not Additional Protocol II to the Geneva Conventions.¹⁶⁴ Even if Protocol II is "beyond any doubt" part of customary law, it

156. Tribunal Statute, *supra* note 5, art. 3.

157. *Id.*

158. Decision of the Appeals Chamber, *supra* note 2, para. 87 (citing the Hague Convention IV, *supra* note 16).

159. *Id.*

160. *Id.* See also O'Brien, *supra* note 6, at 646 ("The elastic 'but not limited to' language of Article 3 ensures that all relevant, well-established international law falls within the tribunal's jurisdiction.").

161. See Decision of the Appeals Chamber, *supra* note 2, paras. 88-89.

162. Cf. 1 Morris & Scharf, *supra* note 4, at 72 ("[T]he International Tribunal does not have unlimited discretion to prosecute and punish persons for the commission of acts other than those referred to in Article 3 of its Statute.").

163. Report of the Secretary-General, *supra* note 5, para. 34 (emphasis added).

164. See *id.*

does not clearly provide for individual criminal responsibility.¹⁶⁵ The Secretary-General's list would presumably encompass Common Article 3 of the Geneva Conventions,¹⁶⁶ but Common Article 3, like Protocol II, does not clearly impose individual criminal responsibility.¹⁶⁷ Not surprisingly, the Chamber did not cite any examples of war crimes prosecutions based on Protocol II or Common Article 3.

The Appeals Chamber nonetheless stressed that after the Security Council approved the Tribunal Statute, four Members of the Council asserted that article 3 should be interpreted broadly.¹⁶⁸ The U.S. delegate, for example, declared that article 3 "include[s] all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including Common Article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to those Conventions."¹⁶⁹ Asserting that "no delegate contested these declarations," the Appeals Chamber concluded that they provided an "authoritative interpretation" of article 3.¹⁷⁰ The Chamber offered no authority for this theory of interpretation.

The declarations may have some interpretive significance,¹⁷¹ but they are hardly dispositive. Most states voting to adopt the Statute took no position on the precise scope of article 3. Indeed, some states expressed qualms about the breadth of the Tribunal's authority. The Japanese delegate suggested that "more extensive legal studies could have been undertaken on various aspects of the Statute, such as the question of the principle of *nullum crimen sine*

165. See 1 Morris & Scharf, *supra* note 4, at 78.

166. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 113 (June 27) (holding that Common Article 3 is part of customary international law).

167. See 1 Morris & Scharf, *supra* note 4, at 78 (noting that Common Article 3 was not a sufficient basis for defining crimes committed during internal armed conflict because of the "absence of the recognition of the concept of individual criminal responsibility" in the provision).

168. See Provisional Verbatim Record of the 3217th Mtg. of the Security Council, May 25, 1993, at 11, U.N. Doc. S/PV.3217 [hereinafter Provisional Verbatim Record] (statement of the French delegate); *id.* at 15 (statement of the U.S. delegate); *id.* at 19 (statement of the British delegate). The Provisional Verbatim Record, *supra*, is reprinted in 2 Morris & Scharf, *supra* note 4, at 179.

169. *Id.* at 15.

170. Decision of the Appeals Chamber, *supra* note 2, para. 88. See also O'Brien, *supra* note 6, at 646 (citing these declarations as evidence of the Council's intent).

171. Cf. *Military and Paramilitary Activities*, 1986 I.C.J. at 107 (referring to statements in the First Committee of the General Assembly).

*lege*¹⁷²—a question raised by a broad interpretation of article 3. The Chinese and Brazilian delegates expressed doubts about this means of establishing an international criminal court—doubts clearly implying that those states did not favor an expansive interpretation of the court's Statute.¹⁷³ The Brazilian delegate also said that many unspecified but important "legal difficulties" were not resolved to his government's satisfaction.¹⁷⁴ The Spanish delegate noted that the Statute could have benefited from improvements, "especially in determining the substantive subject matter and temporal jurisdiction" of the Tribunal.¹⁷⁵

Nor is it dispositive that no state "objected" to the interpretations of article 3 offered by the United States, France, and (arguably) the United Kingdom. The reality is that every state's delegate read a statement prepared or at least vetted in advance by that state's government.¹⁷⁶ No delegate was authorized to jump up and "object" when it heard the final version of the U.S. or French remarks. Moreover, the declarations were made *after* the delegates had already voted on the resolution, so no state was on notice of the P-3's broad interpretation of article 3 until it was too late to vote "no."

Finally, most of the declarations are themselves ambiguous. The U.S. delegate was the only representative to make specific reference to Protocol II and Common Article 3.¹⁷⁷ The British delegate

172. Provisional Verbatim Record, *supra* note 168, at 22 (statement of Mr. Maruyama of Japan).

173. Cf. Provisional Verbatim Record, *supra* note 168, at 26 (statement of Mr. Li Zhaoxing of China) (the Statute "ought to become effective only after having been negotiated and concluded by sovereign States and ratified by their national legislative organs"); Provisional Verbatim Record, *supra* note 168, at 28-29 (statement of Mr. Sardenberg of Brazil) (arguing that a convention would be the "most appropriate and effective" method of establishing such a tribunal).

174. Provisional Verbatim Record, *supra* note 168, at 29 (statement of Mr. Sardenberg of Brazil).

175. Provisional Verbatim Record, *supra* note 168, at 29 (statement of Mr. Yanez Barnuevo of Spain).

176. The author was present at the Security Council while Resolution 827 was "debated." The real debate, of course, took place behind closed doors, as it usually does. Cf. Reisman, *supra* note 116, at 97 ("The Security Council is finally working as planned. Within the Council, the P-5 meet privately to coordinate policy and, within the P-5, the P-3 meet privately to coordinate policy. There is no question about the identity of P-1.").

177. Even the U.S. statement is at odds with a draft of the Statute submitted by the United States barely six weeks earlier, in which the United States proposed that jurisdiction include "[v]iolations of the laws or customs of war, including the Hague and Geneva Conventions. For this purpose, the conflict in the former Yugoslavia . . . shall be deemed to be of an international character." See Article 10(a) of the draft statute proposed by the United States, in Letter Dated April 5, 1993 from the Permanent

said vaguely that article 3 is "broad enough to include applicable international conventions,"¹⁷⁸ without specifying which conventions were "applicable." The French delegate said article 3 covered "all the obligations that flow" from humanitarian conventions in force at the relevant time.¹⁷⁹ He did not indicate, however, whether obligations under Protocol II "flow" from the conflict in the former Yugoslavia, or whether Common Article 3 creates individual criminal responsibility. The Hungarian delegate did say that the jurisdiction of the Tribunal "covers the whole range of international humanitarian law,"¹⁸⁰ but he made no specific reference to article 3 of the Statute, much less to the scope of Common Article 3 or Protocol II.

The state practice cited by the Chamber is no more compelling than the prepared declarations of a minority of the Security Council. The Chamber conceded that traditional humanitarian law distinguished sharply between international and internal armed conflict, but it asserted that the distinction has gradually disintegrated as civil strife has become more vicious and large-scale.¹⁸¹ The Chamber cited relatively little evidence, however, that state practice has "beyond any doubt" abandoned this distinction—the *ex post facto* standard established in the Secretary General's report. The Chamber explained the absence of practice on the grounds that it is difficult to discern the "actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour."¹⁸² Unfortunately, it is all too easy to discern evidence that troops in the field routinely ignore traditional humanitarian law in internal conflicts. The post-Cold War era alone supplies a depressing list of lawless civil wars: Rwanda, Liberia, Somalia, Chechnya, and the former Yugoslavia.

Representative of the United States of America to the United Nations Addressed to the Secretary-General, U.N. Doc. S/25575 (Apr. 12, 1993), reprinted in 2 Morris & Scharf, *supra* note 4, at 451, 454 [hereinafter Draft Statute]. This provision implies that cognizable violations of the "laws or customs of war" must take place in international armed conflict.

The U.S. draft of the Statute might simply imply that the United States believes that only violations of Geneva law, not violations of Hague law, must take place in international armed conflict. But such an implication is inconsistent with the U.S. *amicus* brief in *Tadic*, which asserts that Geneva law does *not* presuppose an international armed conflict. See Decision of the Appeals Chamber, *supra* note 2, para. 83.

178. Provisional Verbatim Record, *supra* note 168, at 19.

179. *Id.* at 11.

180. *Id.* at 20.

181. Decision of the Appeals Chamber, *supra* note 2, para. 97.

182. *Id.* para. 99.

Instead of state practice, the Chamber relied principally on perceived changes in *opinio juris* since the adoption of the Hague and Geneva Conventions.¹⁸³ Some states have endorsed the extension of humanitarian law to internal conflicts.¹⁸⁴ The U.N. General Assembly has twice declared, in non-binding resolutions, that humanitarian law applies to all types of armed conflicts.¹⁸⁵ Moreover, parties to internal conflict have on occasion promised to apply humanitarian law to civil war.¹⁸⁶ But other authority is to the contrary. In its comments on the establishment of the Tribunal, the International Committee for the Red Cross (ICRC) said that "according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of *international* armed conflict."¹⁸⁷ The ICRC, of course, is charged with the application of humanitarian law.¹⁸⁸ In its comments, the U.S. government proposed that the conflict in the former Yugoslavia be "deemed to be of an international character," thus ensuring that traditional humanitarian law would apply; the implication is that there was some doubt that all humanitarian law would apply to an internal conflict.¹⁸⁹ A number of commentators have also

183. See *id.*

184. For example, the British government and the Assembly of the League of Nations asserted that humanitarian law applied to the Spanish Civil War. See *id.* paras. 100-101. Mao Tse-Tung ordered the Chinese peoples' liberation army not to kill or humiliate members of Chiang Kai-shek's army. See *id.* para. 102.

185. See G.A. Res. 2444, U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218 (1968); G.A. Res. 2675, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970). Both are quoted in Decision of the Appeals Chamber, *supra* note 2, paras. 110-11.

186. See Decision of the Appeals Chamber, *supra* note 2, paras. 103-107 (citing examples from parties to civil conflict in Yemen, the Congo, Nigeria, and El Salvador). As the Chamber pointed out, this practice is envisioned by Common Article 3, which calls on parties to internal conflict to adopt special agreements to apply international humanitarian law to the conflict.

The Chamber also noted that the International Committee for the Red Cross (ICRC) has endorsed the extension of humanitarian law to internal conflict. See *id.* para. 109.

187. Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia, DDM/JUR/422b (Mar. 25, 1993), at 2, reprinted in 2 Morris & Scharf, *supra* note 4, at 391-92 [hereinafter Preliminary Remarks].

188. See *id.*

189. See U.S. Draft Statute, *supra* note 177, art. 10(a). In addition, the Commission of Experts appointed before the establishment of the Tribunal said it "understands the general notion of war crimes as comprising any violation of the law of international armed conflicts." See Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), para. 47, in Letter from the Secretary-General to the President of the Security Council, U.N. Doc. S/25274 (1993), reprinted in 2 Morris & Scharf, *supra* note 4, at 311, 320 [hereinafter Commission of Experts Report]. The

expressed the view that the law of international armed conflict does not yet extend to internal armed conflict.¹⁹⁰ Given the disagreement about the question, it seems unlikely that customary law has "beyond any doubt" applied norms of international armed conflict to internal conflict. Again, this is not to say that such an extension is not warranted—only that it must be carried out prospectively, not retrospectively.

Even if customary law does extend the traditional law of war to internal conflict, it does not "beyond any doubt" impose individual criminal responsibility in such circumstances. Only a few of the authorities cited by the Chamber explicitly support individual criminal liability for violations of international humanitarian law in time of civil war.¹⁹¹ The Chamber cited few examples of actual war crimes trials arising out of internal conflict,¹⁹² and no examples of war crimes trials involving violations of Protocol II. To be sure,

Commission nonetheless argued for applying the law of international armed conflict to the situation in the former Yugoslavia because of the "character and complexity of the armed conflicts involved" and because the parties had negotiated agreements on humanitarian issues that may have extended some of the law of international armed conflict to the Yugoslav conflict. See *id.* paras. 43-45, reprinted in 2 Morris & Scharf, *supra* note 4, at 319. As Morris and Scharf argue, the special agreement reached by the parties to the Bosnia conflict "excluded the provisions of the Geneva Conventions concerning individual criminal responsibility." 1 Morris & Scharf, *supra* note 4, at 46 (citing Agreement of May 22, 1992, at 30, U.N. Doc. S/25392).

190. See, e.g., Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, Foreign Aff., Summer 1993, at 122, 128 ("Were any part of the former Yugoslav conflict deemed internal rather than international, the perpetrators of even the worst atrocities could not be prosecuted for grave breaches or war crimes."). Meron nonetheless asserts that "broad consensus" exists that the fighting constituted an international armed conflict. *Id.* See also 1 Morris & Scharf, *supra* note 4, at 57 (asserting that a person responsible for killing innocent civilians in the course of internal conflict in the former Yugoslavia "could not be charged with war crimes that can only be committed during an international armed conflict").

191. See Decision of the Appeals Chamber, *supra* note 2, para. 106 (citing court-martials and executions of Nigerian soldiers for atrocities committed during the Biafra rebellion); *id.* para. 131 (citing the German military manual, which apparently extends some aspects of traditional humanitarian law to internal conflict). Other examples cited by the Appeals Chamber seem more ambiguous. For example, it cited the Yugoslav Criminal Code of 1990, which implemented the Geneva Conventions by making them applicable "at the time of war, armed conflict, or occupation." *Id.* para. 131. The term "war" might traditionally have been taken to mean only international armed conflict, though that reading is admittedly more doubtful today. The Chamber cited another Yugoslav law that, under the Yugoslav Constitution, made the two Protocols to the Geneva Conventions "directly applicable," see *id.* para. 132, but again Protocol II does not make explicit provision for individual criminal liability.

192. The only actual "war crimes trials" cited by the Chamber were court-martials, and eventual executions, of Nigerian soldiers who committed murder during the Biafra conflict. See *id.* para. 106.

there have been trials of individuals for atrocities committed in the course of arguably internal armed conflict.¹⁹³ In most such cases, however, the tribunals have applied national law rather than international humanitarian law.¹⁹⁴ Again, individual criminal responsibility is doubtless the most *desirable* rule,¹⁹⁵ but the Statute was explicitly designed to avoid *ex post facto* application of new rules, even desirable ones.¹⁹⁶

This feature of the Statute distinguishes it, at least nominally, from the Nuremberg Charter, on which the Chamber relied as precedent. The Nuremberg Tribunal held that the criminalization of "crimes against peace" in the Nuremberg Charter did not violate the principle *nullum crimen sine lege* even though there was little explicit authority that waging an aggressive war exposed one to individual criminal liability.¹⁹⁷ But neither the Nuremberg Charter nor any related instruments made any explicit reference to the principle *nullum crimen sine lege*. Indeed, in its decision the Tribunal maintained that because the Charter made war of aggression a crime, "it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement."¹⁹⁸ In other words, the Tribunal doubted that it was bound by the *ex post facto* rule at all. Moreover, the Tribunal conceived of the rule not as a "limitation of sovereignty" but "in general [as] a principle of justice," one that presumably might give way to other countervailing principles of justice, such as avoiding the injustice of permitting Nazi war criminals to walk free.¹⁹⁹ After the Nuremberg Tribunal, some

193. See, e.g., *United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R.), *aff'd*, 22 C.M.A. 534, 48 C.M.R. 19 (1973), petition for writ of habeas granted sub nom. *Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

194. "Major war crimes trials in more recent years, all based on national rather than international law, include Israel's trials of Adolf Eichmann and John Demjanjuk, France's trial of Klaus Barbie, and the United States's trials of Lieutenant William Calley, Captain Ernest Medina, and others in connection with the massacre of civilians at My Lai in South Vietnam." Telford Taylor, *The Anatomy of the Nuremberg Trials* 640 (1992).

195. See generally Lyal S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (1992) (arguing that a general norm of individual criminal responsibility is emerging).

196. See Report of the Secretary-General, *supra* note 5, para. 34.

197. See *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, 445, 447 (1950), quoted in *Decision of the Appeals Chamber*, *supra* note 2, para. 128.

198. *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, *supra* note 197.

199. *Id.*

commentators also suggested that the *ex post facto* rule deserves at most a limited role in international law.²⁰⁰ Other contemporary writers, however, criticized this aspect of the Nuremberg decision.²⁰¹

The blossoming of human rights law in the fifty years since Nuremberg has removed any doubt that the *ex post facto* norm is part of international law. It is enshrined in the Universal Declaration of Human Rights²⁰² and in the International Covenant on Civil and Political Rights.²⁰³ This development, together with the express endorsement of the principle in the Secretary-General's report on the Statute, suggests that the Nuremberg holding on *ex post facto* laws is not controlling.

It might be argued that the *ex post facto* principle should not bar a change in the technical elements of an offense when the conduct engaged in was already clearly criminal. Indeed, one purpose of the *ex post facto* principle is to ensure that the accused has notice that his or her conduct is illegal.²⁰⁴ Tadic surely knew that murder and torture was illegal in Yugoslavia. The *ex post facto* doctrine, though, serves a second, equally important purpose; it guards against abuse of power by the sovereign.²⁰⁵ It forces the sovereign to decide in advance what conduct will be criminal, ensuring that the sovereign cannot selectively pick and choose potential defendants after the fact. It is both a right of the accused and a restriction

200. See, e.g., John Alan Appleman, *Military Tribunals and International Crimes* 48 (1954) ("For in international law there is no restriction as to *ex post facto* law—the question can be only the enforcement of law which is found in the common conscience and which is not subject to quick mutation.") The author adds that the American rule against *ex post facto* laws "is, historically, a pure accident." *Id.* at 49. See also F. B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 *Am. J. Int'l L.* 770, 793 (1948) (expressing skepticism that *ex post facto* doctrines are "expressive of a general practice accepted as law by civilized nations") (footnote omitted).

201. See, e.g., George A. Finch, *The Nuremberg Trial and International Law*, 41 *Am. J. Int'l L.* 20, 34, 36 (1948) (arguing that the judgment violates American conceptions of the *ex post facto* principle, and that "[a]n indefinable act cannot be prohibited in advance unless we are willing to acknowledge our constitutional heresy with respect to *ex post facto* legislation"); cf. Schick, *supra* note 200, at 784 ("*De lege ferenda* the *dictum* of the . . . Tribunal [imposing individual criminal liability for recourse to illegal war] is of far-reaching importance. *De lege lata* the judgment does not correspond with the rules of general international law.").

202. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 16, art. 11(2), at 71, U.N. Doc. A810 (1948).

203. International Covenant on Civil and Political Rights, *supra* note 41, art. 15(1).

204. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 *Duke J. Comp. & Int'l L.* 235, 289 (1993).

205. See *id.*

on the government. Viewed from this perspective, the Tribunal's retroactive amendment of humanitarian law seems inappropriate.

The *ex post facto* doctrine was also defined in very strict terms by the drafters of the Tribunal's Statute, who imposed a high standard on the law of the Tribunal—that it reflect existing law “beyond any doubt.” Measured by this standard, the Tribunal's extension of existing humanitarian law does not seem justified.

This is not to suggest that Tadic should have escaped prosecution for war crimes. The Chamber could have enforced the *ex post facto* principle, thereby refusing to extend the law of international armed conflict to internal conflict, and still ensured that Tadic and his ilk would face trial. The Tribunal could have deemed the conflict in the former Yugoslavia as international in character. Indeed, there already was a broad consensus to that effect.²⁰⁶ The Tribunal seemed receptive to such an argument, but it declined to reach the question.²⁰⁷

The Tribunal's final holding—that article 5 of the Tribunal Statute applies to any type of conflict, international or internal—is eminently sensible. The plain text of the provision states that it applies to all conflicts, “whether international or internal in character.”²⁰⁸ The Tribunal's interpretation of the provision is consistent with the *nullum crimen* principle because it imposes a greater burden on the prosecution than is now required under customary international law. That is, the provision requires the prosecutor to prove the existence of some armed conflict even though customary international law does not seem to require an armed conflict.

In sum, the Appeals Chamber was right to confine article 2 of the Tribunal Statute (criminalizing “grave breaches” of the Geneva Conventions) to international armed conflict, but it went too far in applying article 3 (criminalizing “laws and customs of war”) to both international and internal strife. Its interpretation of article 5 is consistent with the text of the Tribunal Statute and with customary international law.

206. See, e.g., Meron, *supra* note 190, at 128; Commission of Experts Report, *supra* note 189, at para. 43-45; Draft Statute, *supra* note 177, art. 10(a); O'Brien, *supra* note 6, at 640.

207. Of course, even if the Tribunal found that the conflict was purely internal, it could still have tried Tadic for crimes against humanity. Such a case would be more difficult to prove because the prosecutor must show that the defendant's actions were directed against a civilian population. See Tribunal Statute, *supra* note 5, art. 5.

208. *Id.*

V. CONCLUSION

Critics of the Nuremberg judgment derided it as "victors' justice."²⁰⁹ The Nuremberg Tribunal was exacting lawless vengeance that only served to "disguise . . . the real sources of international disturbance"²¹⁰ and to fuel the resentments of the loser, much as the Treaty of Versailles had angered Germans after World War I.²¹¹ These arguments have been proven wrong. Far from disguising the nature of evil, the Nuremberg trial showcased the full extent of the Nazi horror, helping to ensure that it did not rise again. Instead of sparking a new Nazism, the trial helped usher in a half century of peace, albeit a cold peace, throughout Europe.

Will the new International Criminal Tribunal for the former Yugoslavia be as successful? It has only a few men in custody, and high-ranking indictees like Radovan Karadzic and Ratko Mladic remain at large. Nonetheless, the Tribunal has had a positive influence on developments in Bosnia—the primary example being the limitation of Karadzic's role in recent elections.²¹² The Tribunal has also performed an "expressive" function.²¹³ Tadic's trial—broadcast live on Court TV—helped dramatize the atrocities of Omarska to the rest of the world. The Tribunal's decision to extend the law of international armed conflict to internal armed conflict does not honor the principle of *nullem crimen sine lege*, but at least it will set a precedent for prospective application of such an interpretation—a rule that makes sense in a world of vicious civil strife. Moreover, the Tribunal is not vulnerable to the charge that it dispenses "victor's justice." The principle sponsors of the Tribunal were hardly the "victors" in the Balkan war. Many "victors" are now in the dock. The witnesses for the prosecution in the Tadic trial have been the victims of the conflict, not the victors. This is not victor's justice; it is victim's justice.

209. See, e.g., Montgomery Belgion, *Victors' Justice* 187 (1949) ("[N]othing is to be gained after a war by the punishment of the vanquished by the victors, even if the vanquished have been to blame for the war itself.").

210. *Id.* at 6.

211. See *id.* at 5-6, 187. The "worthless" verdict of the Tribunal relied on a "totalitarian notion of justice" involving a "sinister pretension to administer international law." *Id.* at 186.

212. Cf. David J. Scheffer, *International Judicial Intervention*, *Foreign Pol'y*, Spring 1996, at 34, 42-47 (describing the Tribunal's role in the Dayton Accords).

213. Cf. Phillip Bobbitt, *Constitutional Fate* 185-217 (1982) (describing the expressive function of constitutional decision-making).

